Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
1993 Annual Access Tariffs	)	CC Docket No. 93-193
	)	Phase 1
	)	
1994 Annual Access Tariffs	)	CC Docket No. 94-65

COMMENTS OF QWEST CORPORATION

Qwest Corporation ("Qwest") hereby files its comments in response to the *Public Notice* issued by the Wireline Competition Bureau ("Bureau") of the Federal Communications Commission ("Commission") on April 7, 2003.[1] In the *Public Notice*, the Bureau seeks comments on how to resolve the "outstanding" add-back issue pending from the 1993 and 1994 annual access tariff filings by price cap regulated incumbent local exchange carriers ("ILEC").

I. INTRODUCTION AND SUMMARY

The Bureau's *Public Notice* is perplexing, because the add-back issue as it relates to the 1993 and 1994 ILEC tariffs has been resolved, and is no longer an open item permitting any action other than the administrative action of closing the investigation. The add-back rule required ILECs operating under the old price cap sharing rules to account for reductions in their current period price cap indices based on sharing in determining whether additional sharing was due in subsequent periods. Add-back, by counting such reductions as properly belonging in the period from which the sharing responsibility arose, would increase sharing exposure in

[1] *Public Notice*, DA 03-1101, rel. Apr. 7, 2003. Qwest is the successor in interest to U S WEST Communications, Inc. as the result of the merger of U S WEST, Inc. and Qwest Communications International Inc. The 1993 and 1994 annual access tariff transmittals of U S WEST Communications were suspended by the Commission as part of the Commission's *Orders* raised in the *Public Notice*, and Qwest has a direct interest in this proceeding. Qwest will refer to itself in these comments as Qwest, but will refer to the filing party in 1993 and 1994 as U S WEST.

subsequent tariff filings. But the add-back rule did not apply to the 1993 and 1994 tariff filings. The 1993 and 1994 access tariffs had been suspended in part to allow for the possibility of refunds based on the resolution of a then-pending rulemaking on the add-back question. That rulemaking resulted in the adoption of the add-back rule. The *Report and Order* adopting that rule specified that the rule would not apply to any tariff filings made prior to 1995.[2] Accordingly, under the terms of the Commission's *Orders* suspending the tariffs and designating the add-back issue, the matter is now closed and the investigations themselves must be closed without further action.

II. THE COMMISSION HAS ALREADY DETERMINED THAT THE ADD-BACK RULE DOES NOT APPLY IN THE 1993 AND 1994 ANNUAL ACCESS TARIFF PROCEEDINGS. THIS DECISION IS FINAL AND NOT SUBJECT TO FURTHER CONSIDERATION OR ACTION.

In the *Public Notice*, the Bureau invites parties and others to submit comments on the "add-back" issue as it was designated in the investigations of the 1993 and 1994 annual access tariff filings of those ILECs who had low-end adjustments or sharing in the previous year. These investigations have not been formally terminated, and the *Public Notice* asks whether any further action should be taken with regard to the rates that took effect in those years. In 1993 and 1994, it had been Qwest's understanding that add-back in a sharing context was not required, and Qwest calculated its price cap indices accordingly. The add-back rule, adopted in 1995, requires that a price cap LEC in a "sharing" environment recognize its "sharing" rate reduction as a reduction to the period in which the "sharing" obligation was incurred, not the period in which the reduction was effective. As a result of an add-back adjustment, a carrier could effectively incur "sharing" liability for a period in which its earnings were below the "sharing" zone if the

[2] *In the Matter of Price Cap Regulation of Local Exchange Carriers, Rate-of-Return Sharing and Lower Formula Adjustment*, *Report and Order*, 10 FCC Rcd. 5656, 5665 ¶ 49 (1995) ("*Add-*

fact that the carrier earned below the "sharing" limit was caused by a sharing reduction from a previous period. The opposite result could occur if a carrier had taken advantage of a low-end adjustment to increase its price cap indices, in which case add-back treatment would increase the potential "sharing" for the current period.

A. The Add-Back Issue In The Context Of The 1993-1994 Tariff Investigations

The history of add-back in the context of the 1993 and 1994 annual access tariff investigations is critical to proper disposition of the questions raised in the *Public Notice*. On June 18, 1993, the Commission adopted a *Notice of Proposed Rulemaking* seeking comment on whether an add-back rule should be adopted and applied to the tariffs of price cap LECs.[3] The *Add-Back NPRM* tentatively concluded that the add-back rule already existed by implication and sought comment on whether add-back "should continue to be part of the rate of return calculations of LECs subject to price caps. . . ."[4] This "tentative conclusion" was vigorously disputed by many commenters in the proceeding.[5]

Shortly after adopting the *Add-Back NPRM*, the Bureau released its *Memorandum Opinion and Order* designating issues for investigation in the proceeding involving the 1993 annual access tariff filings of the ILECs.[6] In that *MO&O* the add-back issue was expressly

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Back Order").

[3] *In the Matter of Price Cap Regulation of Local Exchange Carriers, Rate of Return Sharing and Lower Formula Adjustment*, *Notice of Proposed Rulemaking*, 8 FCC Rcd. 4415 (1993) ("*Add-Back NPRM*").s

[4] *Id.* at 4417 ¶ 15.

[5] *See* Comments of U S WEST Communications, Inc., CC Docket No. 93-179, filed Aug. 2, 1993, at 5-6 ("U S WEST Add-Back Comments"), Reply Comments of U S WEST Communications, CC Docket No. 93-179, filed Sep. 1, 1993, at 4-6 ("U S WEST Add-Back Reply").

[6] *In the Matter of 1993 Annual Access Tariff Filings*, *Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation*, 8 FCC Rcd. 4960 (1993) ("*MO&O*").

recognized. The *MO&O* observed that any rule adopted in the Add-Back proceeding would be binding in the tariff investigation, noting that it was reasonable to suspend the tariffs and subject them to an accounting order because the add-back issue was "unresolved" pending adoption of rules.[7] Accordingly, ILEC tariffs that included a sharing amount or a low-end adjustment were suspended and subjected to an accounting order pending resolution of the add-back issue in the rulemaking proceeding.[8] The add-back part of the investigation would be governed by the decision in the rulemaking itself. The Commission designated the following issue on add-back:

> How should price cap LECs reflect amounts from prior year sharing or low-end adjustments in computing their rates of return for the current year's sharing and low-end adjustments to price cap indices?[9]

U S WEST filed its Direct Case on July 27, 1993. U S WEST responded to the add-back designated issue as follows:

> The Commission's price cap rules limit sharing and low-end adjustments to a single year. As such, U S WEST believes that it is inappropriate to adjust any given year's earnings (*i.e.*, by "adding back") to determine whether a sharing or low-end adjustment is required for the upcoming year. Adjusting current rates of return for prior year sharing or low-end adjustments would be a substantive change in the Commission's price cap rules and is not permitted without conducting a rulemaking.[10]

In its comments and reply comments in the rulemaking proceeding involving add-back, U S WEST took the same position. U S WEST argued that, while add-back would be unwise as a rule, any rule regarding add-back would constitute a change in existing Commission rules and could be applied only prospectively.[11]

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[7] *Id.* at 4965 ¶ 32.

[8] *Id.*

[9] *Id.* at 4973 ¶ 105(2).

[10] U S WEST Direct Case, CC Docket No. 93-193, filed July 27, 1993, at 8-9 (footnotes omitted).

[11] *See* U S WEST Add-Back Comments at 5-6, U S WEST Add-Back Reply at 4-6.

When the 1994 annual access filings were made, the 1993 tariff docket and the add-back rulemaking were both still pending. Again recognizing that the add-back issue would be resolved in the rulemaking proceeding, the Commission suspended the 1994 rates of those carriers with prior year sharing or low-end adjustment issues until the 1993 tariff investigation and the rulemaking had been completed.[12] However, the add-back issue was not set for further investigation, but was instead simply made subject to the 1993 investigation, with the caveat that additional filings would be requested after the termination of the 1993 investigation documenting why the 1993 conclusions concerning add-back should or should not apply to the 1994 tariffs:

> After the termination of the 1993 investigation and prior to the termination of this investigation, we will give parties an opportunity to present any legal argument or factual circumstances that would lead us to conclude that the decisions reached in CC Docket No. 93-193 on add-back issues should not control our treatment of the 1994 access transmittals.[13]

Because the add-back issue was not designated as an issue in the 1994 investigation, U S WEST did not address it further in its 1994 Direct Case.[14]

Thereafter (in 1995), the add-back rulemaking was brought to conclusion. The Commission found that the add-back rule should be adopted.[15] The *Add-Back Order* also addressed the comments of various parties claiming that any add-back rule could be applied only on a prospective basis (*i.e.*, the 1993 and 1994 tariff investigations). The Commission concluded that, as a matter of law, the add-back rule could be applied only prospectively -- *i.e.*, to rates filed in 1995 and thereafter. In the words of the Commission:

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[12] *In the Matter of 1994 Annual Access Tariff Filings*, *Memorandum Opinion and Order Suspending Rates*, 9 FCC Rcd. 3705, 3750 ¶¶ 105-06 (1994).

[13] *Id.* at 3713 ¶ 12.

[14] *See In the Matter of 1993 Annual Access Tariff Filings, 1994 Annual Access Tariff Filings, Order Designating Issues for Investigation*, 10 FCC Rcd. 11804 (1995); Direct Case of U S WEST, CC Dockets Nos. 93-193, *et al.*, filed Aug. 14, 1995.

> We agree with commenters that the explicit add-back rule adopted here may, as a legal matter, be applied only on a prospective basis. [footnote citing to *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988)] Accordingly, this rule will first be applied when carriers file their 1995 access tariffs. At that point, carriers must make an adjustment to offset any sharing or low-end adjustments made for 1994 rates to determine any 1995 required sharing or permitted low-end adjustments.[16]

This conclusion definitively resolved the add-back issues pending in the 1993 and 1994 tariff investigations.

Price cap LECs (including U S WEST) objected to the substance of the add-back rule and took their grievances to the United States Court of Appeals for the D.C. Circuit, where the Commission's rules were affirmed in their entirety.[17] No party appealed the determination that the add-back rule was to be applied prospectively only. All aspects of the add-back rule accordingly became final.

B. The Determination In The *Add-Back Order* That The Add-Back Rule Would Not Be Applied To 1993 Or 1994 Tariff Filings Is Conclusive And May Not Be Revisited.

Thus, the add-back issue specified for investigation in the 1993 and 1994 annual access tariff proceedings was determined with finality in the *Add-Back Order*. Under the terms of that *Order*, add-back cannot be required for the years 1993 or 1994 without violating the very premise upon which the rates of ILECs with sharing liability in 1993 or 1994 were suspended in the first place. These tariff investigations were designed to implement the add-back rule once it was adopted. That rule was adopted in the *Add-Back Order*, which conclusively determined that it would not be applied to the 1993 and 1994 tariff investigations. That *Order* was affirmed on appeal and is not subject to further review. In other words, the add-back rule itself, because it

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[15] *See Add-Back Order,* 10 FCC Rcd. 5656.

[16] *Id.* at 5665 ¶ 49.

[17] *Bell Atlantic Telephone Companies v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996).

was adopted as a prospective rule in a proceeding in which the possibility of retroactive application was directly considered, precludes its application to tariffs filed prior to 1995.[18] The *Add-Back Order* is final in all respects, including the explicit finding that the add-back rule adopted therein was to operate on a prospective basis only.

Moreover, the add-back rule adopted in the *Add-Back Order* is likewise binding in the tariff proceedings involving ILEC 1993 and 1994 annual access tariff filings. Both the 1993 and the 1994 investigations of ILEC annual access tariff filings were predicated on the announced expectation that the Add-Back rulemaking proceeding would, when decided, resolve the add-back issue in those proceedings as well. The add-back rule did just that -- by determining that the rule was not retroactive in nature, the *Add-Back Order* established definitively that add-back would not be applied to the 1993 or 1994 annual access tariff investigations. Thus, the tariff investigations have been effectively completed as well.

The Commission may not restart a Section 204 tariff investigation many years after the investigation has been concluded in a context that might lead to refunds.[19] The only procedural vehicle for a challenge to the filed tariffs based on add-back issues would be a formal complaint under Section 208,[20] and such a complaint would be barred by Section 415(b) of the Communications Act. All that is left is the administrative task of closing the investigations based on the conclusions in the *Add-Back Order* itself. The current proceeding is unnecessary,

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[18] It is obviously too late to reconsider the *Add-Back Order*. Petitions for reconsideration or reconsideration on the Commission's own motion would have had to have been undertaken eight years ago, and review was not even sought of the determination in the *Add-Back Order* that the add-back rule would not be retroactive in application. *See* 47 C.F.R. §§ 1.106(f), 1.108.

[19] 47 U.S.C. § 204. Qwest submits that, notwithstanding the fact that the 1993 and 1994 tariff dockets technically remain open, revisiting the add-back issue for those years after its definitive resolution in the rulemaking would constitute the quintessence of retroactive ratemaking. *See Illinois Bell Telephone Company v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992).

[20] 47 U.S.C. § 208.

as the Commission cannot at this date modify the terms of the *Add-Back Order* without a further rulemaking following notice and comment,[21] and it cannot modify the add-back treatment incorporated into the tariff investigations at all.[22]

C. The Decision To Apply The Add-Back Rule Prospectively Was Based On Sound Legal And Policy Considerations.

Because the add-back issue has been finally resolved for the 1993 and 1994 tariff investigations, it is not really necessary to examine whether this resolution was correct or not. Nevertheless, because the Commission's decision to apply the add-back rule on a prospective basis only was clearly correct, we address that issue briefly herein. Qwest and other carriers had interpreted the price cap rules as providing that a sharing deduction would be a "one-time event," and that sharing would not carry over into subsequent tariff filings. The add-back rule, when adopted, changed that assumption and the practice of Qwest and other carriers. Such a change was, necessarily, made on a prospective basis, and the Commission relied on the Supreme Court decision in *Bowen v. Georgetown University Hospital*[23] in making this determination. U S WEST and others likewise relied heavily on the *Bowen* decision in their comments, and the

[21] Given the fact that the "sharing" rule no longer exists, a proceeding to adopt a new add-back rule would seem to be a fairly futile exercise.

[22] In order for someone to challenge the rule adopted in the *Add-Back Order*, a party would need to petition the Commission to conduct a new rulemaking or other public proceeding to adopt a different add-back rule. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). *See also National Mining Ass'n v. Department of the Interior*, 70 F.3d 1345, 1349 (D.C. Cir. 1995); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959). The existing rule is final and the same Administrative Procedure Act constraints that apply to the adoption of a rule would apply to any proceeding by the Commission to modify or eliminate that same rule. *State Farm*, 463 U.S. at 48. That rule certainly cannot be undone in a tariff investigation.

[23] *Add-Back Order*, 10 FCC Rcd. at 5665 ¶ 49, citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

Bowen case is directly applicable to the Commission's decision. The Supreme Court stated the basic principle of retroactivity as applied to agency rules in *Bowen* as follows:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.[24]

The principles enunciated in *Bowen* were clearly applied correctly in the *Add-Back Order*. Carriers are entitled to a modicum of certainty when they charge the rates set forth in their tariffs. When the Commission modifies its tariff rules, it must do so on a prospective basis as it correctly did in the *Add-Back* proceeding.

III. CONCLUSION

The add-back issue for the 1993 and 1994 annual access tariff filings has already been decided in the *Add-Back Order* -- which determined that the add-back rule would not be applied to those tariff filings. This finding is final and is not subject to further review. The Commission should simply terminate the 1993 and 1994 annual access tariff dockets without further action.

Respectfully submitted,

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[24] *Bowen*, 488 U.S. at 208.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION** to be filed with the Secretary of the FCC via the FCC's Electronic Comment Filing System and served via e-mail on the FCC's duplicating contractor Qualex International, Inc. and Ms. Tamara L. Preiss, Chief of the Pricing Policy Division, Wireline Competition Bureau.

/s/ Richard Grozier
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